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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 97M-196  
80133

Dec 3 11:00 AM '97

In Matter of ) WT DOCKET NO. 94-147  
JAMES A. KAY, JR. )  
Licensee of one hundred fifty two )  
Part 90 licenses in the )  
Los Angeles, California area. )

O R D E R

Issued: November 26, 1997 ; Released: November 28, 1997

This is a ruling on Wireless Telecommunications Bureau's Motion To Compel Production Of Documents that was filed by the Bureau on April 16, 1997. The Motion was based on Objections To Wireless Telecommunications Bureau's Second Request For Production Of Documents ("Objections") that were filed by James A. Kay, Jr. ("Kay") on April 9, 1997, which was responsive to a Second Request For Production Of Documents ("Second Request") that the Bureau had served on Kay on March 25, 1997.<sup>1</sup>

Second Request

In its Second Request, the Bureau asked for the production of:

1. Transcripts of depositions in state civil actions that were commenced on or after December 13, 1994, to which Kay was a party and limited to those depositions that were taken by Kay of Commission licensees (former or present), principals, shareholders and persons associated with or employed by such licensees, or end-users of licensed radio facilities.
2. Documents obtained by Kay in those same civil actions which relate to Commission licensees or end-users of radio facilities.
3. Agreements and related documents between Kay and deponents who were Commission licensees, principals, shareholders, associates or employees of licensees, or end-users of licensed radio facilities.

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<sup>1</sup> Recall that this case was in abeyance from April 14, 1997, to October 2, 1997, for consideration of Kay's motion to disqualify the Presiding Judge. See Memorandum Opinion And Order FCC 97-349, released October 2, 1997.

### Opposition To Second Request

In his Opposition, Kay affirmed that he would produce all documents responsive to the first category (depositions except for privileged documents) and listed 63 witness depositions. Copies of a certain few of those depositions have been produced which include the depositions of likely hearing witnesses who were identified by the Bureau. Kay objected to the production of the second category (documents) and third category (agreements) of the Bureau's Second Request on the grounds that the requests were excessively broad, oppressive and burdensome and not shown to be reasonably calculated to lead to the discovery of admissible evidence.

### Motion To Compel

In its Motion To Compel, the Bureau acknowledges receipt of "several" of the depositions that are responsive to the first category of the Second Request. The Bureau argues without further specificity that it "believes that depositions of other persons within the scope of the Bureau's request" were taken by Kay and are available. Bureau counsel also believes that there are more depositions responsive to the Second Request than the 64 listed by Kay. The Bureau asks that on the basis of its belief, all deposition transcripts should be ordered to be produced or Kay should be required to describe the documents being withheld.<sup>2</sup> Similarly, in asking that Kay be compelled to produce documents and agreements, the Bureau argues that it has been reasonable in limiting the requests to "individuals who are engaged in activities related to the FCC." The Bureau also argues that Kay is not being asked to compile data but only to produce existing documents which Kay obtained through discovery in state civil lawsuits involving persons who have FCC licenses or who are the end-users of FCC regulated radios.

### Opposition To Motion To Compel

In his Opposition To Motion To Compel Production Of Documents filed on October 24, 1997, Kay argues that the deposition transcripts which are the subject of the Second Request were addressed in a Prehearing Conference of October 9, 1997, and were ordered to be produced by the Presiding Judge in Order FCC 97M-170, released October 14, 1997. Kay also notes that the "vast majority" of the depositions relate to a civil action styled Kay v. Pick, et

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<sup>2</sup> The Bureau also asks that Kay be ordered to identify any privilege and state the reason. It is difficult to conceive of a "privileged" deposition since the nature of the deposition is to give non-privileged information under oath to the opposing party. If a privilege is asserted in the course of the deposition the transcript will reflect the claimed privilege, the subject matter as to the privilege asserted, and the reason or basis for asserting the privilege. The Bureau would receive the transcript of the testimony as taken. It would be excessively burdensome to require Kay to review all transcripts for privilege and then report findings to the Bureau whether or not the transcript was produced in this case. At this stage of discovery, the Bureau will receive the depositions in the form that they were taken.

al. which was commenced on August 18, 1993, more than one year before the relevant date set by the Bureau in its Second Request. Kay admits that he inadvertently failed to produce the deposition transcript of Frank Barnett, taken on November 15, 1996, in a case styled Kay v. Liberty.<sup>3</sup> Kay argues the absence of specificity in the Bureau's Second Request For Documents and Agreements which relate to "individuals who are or have been engaged in activities related to the FCC." See Bureau's Motion To Compel at 3. But Kay agrees to provide the documents (subject to any privilege) which were used in connection with the depositions which are being produced by Kay in response to the Second Request.

### Discussion

The Commission's rules provide for the discovery of documents "used for the discovery of relevant facts, for the production and preservation of evidence for use at the hearing, or for both purposes." 47 C.F.R. §1.311 (general). The testimony gained from the discovery need only be "reasonably calculated to lead to the discovery of admissible evidence." 47 C.F.R. §1.311(b) (scope of examination). But in the context of such broad initial discovery, the Commission's Policy is directed to the "intelligent selection --- of procedures which will prove most effective and expeditious in a particular set of circumstances." Discovery Procedures, 11 F.C.C. 2d 185, 186 (1968). In that same context, the Commission expects "cooperation of the communications bar" and, by extrapolation, the parties themselves and particularly licensees. Id. See also Rules of Practice in Discovery, 91 F.C.C. 2d 527, 536-537 (1982) (Presiding Judge to control and regulate discovery and parties are expected to cooperate).

It cannot be determined from the Bureau's Second Request whether the documents are related to the issues in this case simply because the parties to the state litigation are licensees or users of licensed facilities. Therefore, the broad discovery sought by the Bureau of documents and agreements will be denied at this time under delegated discretion to preclude procedures "in a particular case if [the Presiding Judge] finds that their use will not contribute to the proper conduct of the proceeding." Id. at 187.

Thus, Kay's counsel will not be asked to review the universe of the transcripts and related documents sought by the Bureau for relevance. That task should be assigned to the Bureau with the least inconvenience to Kay. A review by the Bureau of deposition transcripts which are in the possession of Kay's counsel and/or of Kay himself must be made available for inspection

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<sup>3</sup> Kay qualifies the response by stating that the Barnett transcript will only be produced if the Bureau lists Mr. Barnett as a witness. That will not be necessary. The Presiding Judge is satisfied that Kay has sufficiently identified Barnett as a source of relevant discovery and the deposition must be produced to the Bureau forthwith. Also, it would facilitate the process if Kay's counsel produced the deposition of David Pfeifer which would moot the recently filed motion to compel. Apparently, Mr. Pfeifer's name was omitted as a possible hearing witness because of his condition of health. Kay cannot withhold transcripts or documents which are relevant to the issues merely because the Bureau has not listed the deponent as a potential witness.

by the Bureau at a place that is convenient to Kay and his counsel. Therefore, Kay can pick the place for inspection of the depositions sought by the Bureau which have not been produced, along with the documents which were used in the depositions which were not claimed to be privileged. If the transcripts are in the possession of counsel on the west coast who are litigating the state actions, those transcripts and related documents could be made available to the Bureau's investigators and/or Bureau counsel during or immediately following the December depositions. Notes could be taken by Bureau personnel on the contents of the depositions/documents to be used for the basis of a further motion to compel based on specific information obtained from the inspection. Of course the examination could take place at the offices of Mr. Kay's Washington, D.C. counsel in the interest of the convenience of all the attorneys for both sides who are litigating this case before the Commission. That is Mr. Kay's choice. But a resolution of the logistics is to be worked out before counsel leave for the west coast depositions in December.

In light of the age of this case, it is incumbent on the Bureau to streamline its case to the extent feasible and focus on discovery and hearing evidence for which there is reason to believe or a reasonable probability that it will be probative of the issues set in this case. By the same token, Kay should make its evidence available to the Bureau for inspection, including readily accessible deposition transcripts and documents and radio stations not already examined by the Bureau. Kay is a licensee and has an obligation to cooperate.<sup>4</sup> As of this point, it appears that the parties are attempting to get on schedule in preparing to depose west coast witnesses in December who have been identified by the Bureau as persons who are reasonably expected to have evidence that is relevant to the issues.

#### Rulings

Accordingly, IT IS ORDERED that the Motion To Compel Production Of Documents filed by the Wireless Telecommunications Bureau on April 16, 1997, IS DENIED in part.

IT IS FURTHER ORDERED that James A. Kay, Jr. SHALL PRODUCE FORTHWITH the transcript of the deposition testimony of Frank Barnett that was taken on November 15, 1996.

IT IS FURTHER ORDERED that the respondent/licensee James A. Kay, Jr. SHALL MAKE AVAILABLE FOR INSPECTION at the offices of Mr. Kay's attorneys, or at his place of business, copies of the depositions and documents used at the state court depositions where the deponents were Commission licensees,

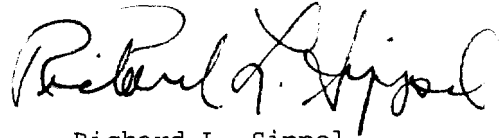
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<sup>4</sup> For example, there is a pending motion filed by the Bureau asking for the sequestration of witnesses at the depositions. The Presiding Judge has a strong preference for sequestration of fact witnesses and therefore it would be preferable that Mr. Kay be deposed first if he wishes to attend all depositions.

shareholders, employees or affiliates of licensees or end-users of radios (except for documents claimed privileged which have not been disclosed), such inspection to take place at dates and times to be agreed to by counsel.<sup>5</sup>

IT IS FURTHER ORDERED that by January 21, 1998, Bureau counsel SHALL FILE a final Request For Documents which describes the information that is reasonably expected to be obtained by the production of specified transcripts and documents identified by the person(s) who were deposed by Kay in the state actions.

FEDERAL COMMUNICATIONS COMMISSION<sup>6</sup>

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with the first name "Richard" being more prominent.

Richard L. Sippel  
Administrative Law Judge

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<sup>5</sup> If documents are withheld from inspection or production on a claim of privilege, a separate list must be furnished to the Bureau which describes each document by subject, author, recipient or sendee(s) and date, and the privilege should be stated and reasons given for its availability.

<sup>6</sup> Courtesy copies of this Order were faxed or e-mailed to counsel on date of issuance.